In The Supreme Court
Appeal From The Court of Appeals
Honorable Peter D. O'Connell, Presiding

THE TITLE OFFICE, INC., a Michigan corporation,

Plaintiff/Appellee,

v

VAN BUREN COUNTY TREASURER,

Defendant/Appellant,

and

Docket Nos. 121077, 121078

ALLEGAN COUNTY TREASURER, BRANCH COUNTY TREASURER, HILLSDALE COUNTY TREASURER, IONIA COUNTY TREASURER, JACKSON COUNTY TREASURER, KALAMAZOO COUNTY TREASURER, and LIVINGSTON COUNTY TREASURER,

Defendants.
_____/

THE TITLE OFFICE, INC., a Michigan corporation,

Plaintiff/Appellee,

v

BRIEF OF AMICUS CURIAE MICHIGAN ASSOCIATION OF REALTORS®

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JURISDICTIONAL SUMMARY

The Michigan Association of REALTORS® agrees with the Appellants that this Court has jurisdiction over this matter pursuant to MCR 7.301(A)(2) and MCR 7.302. On April 2, 2003, this Court granted Appellants' respective Applications for Leave to Appeal from the January 18, 2002 decision of the Court of Appeals in Title Office, Inc v Van Buren Co Treasurer, 249 Mich App 322; 643 NW2d 244 (2002). The Applications were filed following the Court of Appeals' decision by way of an Order entered February 8, 2002 not to convene a special panel pursuant to MCR 7.215(I), now MCR 7.215(J). See, MCR 7.215(I)(7), now MCR 7.215(J)(7).

COUNTER-STATEMENT OF QUESTION INVOLVED

I. DO THE FEE PROVISIONS OF THE MICHIGAN FREEDOM OF INFORMATION ACT RATHER THAN THE PROVISIONS OF MCL 48.101 GOVERN THE FEE A COUNTY TREASURER MAY CHARGE FOR COPYING ELECTRONIC PROPERTY TAX DATA ONTO A MAGNETIC COMPUTER TAPE?

The Circuit Court answered "Yes;"

The Court of Appeals, constrained by MCR 7.215(I)(1), now MCR 7.215(J)(1), answered "Yes;"

Defendants/Appellants answer "No;"

Plaintiff/Appellee answers "Yes;"

Amicus Curiae, the Michigan Association of REALTORS®, answers "Yes."

I. INTRODUCTION AND STATEMENT OF INTEREST

The Michigan Association of REALTORS® (the "Association") is Michigan's largest non-profit trade association, comprised of 48 local boards and a membership of more than 26,000 brokers and salespersons licensed under Michigan law. A basic objective of the Association is to establish and maintain a high degree of ethical practice by and amongst its members through compliance with the licensure requirements of the Occupational Code, compliance with the strict Code of Ethics of the National Association of REALTORS®, and through adherence to standards of practice established to assure understanding and compliance with the Code of Ethics. The Association, through imposition of continuing education requirements, provides training and expertise to local, state and national real estate professionals.

Each day, the Association's members are involved in hundreds of real estate transactions across the State of Michigan. Many of those transactions involve, either directly or indirectly, obtaining property tax data and other records from various municipal authorities. For this reason, the Association and its members have a significant interest in the outcome of any court decision that might affect the amount of fees those municipalities, including counties, may lawfully charge for reproducing those records. Suffice it to say, the Association has a vital interest in the outcome of any court decision where a municipality seeks to justify charging tens of thousands of dollars for providing public records that can be reproduced electronically for a tiny fraction of that amount.

In Grand Rapids v Consumers Power Co, 216 Mich 409, 415; 185 NW 852 (1921), this Court stated: "[t]his Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief Amicus Curiae. . ." The Association believes that this case

involves an issue of fundamental importance to the Association and its members. The Association's experience and expertise may be beneficial to this Court in resolving the substantive issue presented by this appeal. Accordingly, the Association submits this Brief Amicus Curiae in support of the position of Plaintiff/Appellee.

II. COUNTER-STATEMENT OF FACTS

A. Factual Background And The Nature Of The Dispute

The relevant facts, insofar as the Association is aware, are essentially undisputed. In 1998, Plaintiff/Appellee, The Title Office, Inc. ("Plaintiff"), submitted requests under the Michigan Freedom of Information Act, MCL 15.231 et seq ("FOIA"), to various County Treasurers, Defendants/ Appellants ("Defendants"), seeking electronic copies of Defendants' property tax records for the years 1995-1997.[1] The issue in this case concerns not whether Plaintiff is entitled to copies of those records in electronic form, but whether Defendants can lawfully charge Plaintiff tens of thousands of dollars for reproducing them. If limited to the fee set forth under FOIA, the fee Defendants can charge Plaintiff is minimal. In this connection, MCL 15.234(1) and (3) provide, in pertinent part:

> (1) . . . [T]he fee shall be limited to actual mailing costs, and to the actual incremental cost of duplication or publication including labor, the cost of search, examination, review, and the deletion and separation of exempt from non-exempt information as provided in Section 14 . . ..
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> * * *

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[1] See, Appellant's Appendix in Docket Nos. 121077 and 121078, at pp A1-A4; see also, Letters attached as Exhibit B to Appellants' Brief in Docket Nos. 121177 and 121178.

> (3) In calculating the cost of labor incurred in duplication and mailing and the cost of examination, review, separation, and deletion under subsection (1), a public body may not charge more than the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request under this act. Fees shall be uniform and not dependent upon the identity of the requesting person. A public body shall utilize the most economical means available for making copies of public records.

MCL 15.234(1) & (3) (emphasis added).

There is evidently no dispute in this case that the records in question are readily available in computerized form, and can be reproduced in that form at minimal cost. (See, e.g., Court of Appeals' Opinion, n 3; Appellant's Appendix in Docket Nos. 121077 and 121078 at p A20; Appellants' Brief in Docket Nos. 121177 and 121178 at p 1.) Nevertheless, Defendants have demanded that Plaintiff pay them tens of thousands of dollars to obtain this computerized data.[2] In so doing, Defendants claim that such exorbitant charges are authorized, if not required, by the language of MCL 48.101.

Originally passed by the Legislature in 1895, MCL 48.101 provides, in relevant part:

> (1) A county treasurer shall make upon request a transcript of any paper or record on file in the treasurer's office for the following fees:

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[2] According to the Court of Appeals' Opinion, Livingston County demanded a fee of $63,750, the fee in Van Buren County was $33,750, the fee in Allegan County was $17,332.25, and in Ionia County, $2,502.20. Title Office, Inc v Van Buren Co Treasurer, 249 Mich App 322, 324, n 2; 643 NW2d 244 (2002). (Appellant's Appendix, Docket Nos. 121077 and 121078 at p A20.) In the Oakland County case discussed later on in this Brief, the fee amounted to $438,000, or nearly half a million dollars. See, Oakland Co Treasurer v The Title Office, Inc, 245 Mich App 196, 198; 627 NW2d 317 (2001).

> (a) For an abstract of taxes on any description of land, 25 cents for each year covered by the abstract.
>
> (b) For an abstract with statement of name and residence of taxpayers, 25 cents per year for each description of land covered by the abstract.
>
> (c) For list of state tax lands or state bids, 25 cents for each description of land on the list.
>
> (d) For 1 copy of any paper or document at the rate of 25 cents per 100 words.
>
> (e) For each certificate, 25 cents.

(Emphasis added.)

Defendants maintain that MCL 48.101 rather than FOIA's fee provisions applies to Plaintiffs' requests by virtue of MCL 15.234(4), which provides:

> (4) This section [MCL 15.234] does not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute.

B. Circuit Court Proceedings

After separate lawsuits were filed and thereafter consolidated in Livingston County Circuit Court, Plaintiff filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10). (See, Appellants' Appendix in Docket Nos. 121177 and 121178 at p A4.) Applying the plain language of MCL 48.101, the Circuit Court granted Plaintiff's motion, ruling that MCL 48.101 did not apply because Plaintiff did not request a "transcript" or "abstract" of anything. In relevant part, the Circuit Court explained:

> [T]he Transcripts and Abstracts of Records Act [MCL 48.101] does not specifically designate the amount of the fee for providing

> a copy of the public record. Although the Transcripts and Abstracts of Records Act designates the amount of the fee for abstracting or transcribing a portion of the record, Plaintiff [sic] did not request a transcription or an abstract. Plaintiff requested a computer tape containing each county's property tax records. Thus, the statute does not specifically designate the amount of the fee for providing a copy of the record in the computer format requested.

[See, Appellants' Appendix in Docket Nos. 121177 and 121178, p A-6 (emphasis added).]

C. The Court Of Appeals Decision

In a published decision issued January 18, 2002, the Court of Appeals affirmed Title Office, Inc v Van Buren Co Treasurer, 249 Mich App 322; 643 NW2d 244 (2002) ("Van Buren"). (Appellant's Appendix in Docket Nos. 121077 and 121078 at pp A17-A27.) Recognizing that it was bound by its prior published decision in Oakland Co Treasurer v The Title Office, Inc, 245 Mich App 196; 627 NW2d 317 (2001) ("Oakland County"), the Court of Appeals held that the fee provisions of the FOIA, MCL 15.234(1) and (3), applied to Plaintiff's requests. The court explained, however, that were it not for its prior decision in Oakland County, the court would hold that the fee for complying with Plaintiff's requests was governed instead by the provisions of MCL 48.101. Van Buren, supra, 249 Mich App at 335-336. (Appellant's Appendix, Docket Nos. 121077 and 121078, pp A25-A26.)

The thrust of the court's reasoning in Van Buren is found in its conclusion that electronically copied property tax records fit within the definition of the word "transcript" as it appears in MCL 48.101. In this regard, the Court of Appeals explained:

> When a statute does not define a term, we will ascribe its plain and ordinary meaning. . . . In the present case, the TARA does not contain a specific definition for the term "transcript." When a statute does not expressly define a term, courts may consult

> dictionary definitions in order to ascertain the ordinary meaning of the term. . . . Therefore, we turn to the common understanding of the term "transcript" to resolve the present case. The common meaning of the term includes "something transcribed or made by transcribing," and "an exact copy or reproduction, esp[ecially] one having an official status." *Random House Webster's College Dictionary* (1992), p. 1416. Further, the term has been defined to mean "that which has been transcribed," or a "copy of any kind." Black's Law Dictionary (6th ed.), p. 1497.
>
> Plaintiff argues that the TARA governs only "*written* documents" and "paper copies." However, the TARA does not contain the term "written," and it does not state that a county treasurer shall make, upon request a "paper copy" of its records. Rather, the statute applies broadly, requiring a county treasurer to make, upon request, " a transcript of any paper or record on file in the treasurer's office." MCL 48.101(1). An electronic copy of property tax records qualifies as a "transcript" of that record for purposes of TARA. The medium on which the record is copied is of no significance. A copy is a copy, whether the information is handwritten, typed, photocopied, or electronically copied; it remains a copy, whether the information is placed onto paper, magnetic tape, or a computer disk.
>
> Plaintiff also argues that the Legislature could not have intended the TARA to apply to electronic copies of county records because the Legislature enacted the statute in 1895, before the invention of computers. However, if we accepted plaintiff's logic, then we would also be compelled to hold that the schedule of fees contained in the TARA does not properly apply to photocopies of county records, because the 1895 Legislature could not have envisioned the invention of photocopy machines. The Legislature chose to frame the statute in broad terms, applying to "any paper or record" on file in the treasurer's office. MCL 48.101. This language is certainly broad enough to include records that are not maintained on paper.

[Id at 334-335; Appellant's Appendix, Docket Nos. 121077 and 121078 at p A25. (emphasis added, footnote omitted).]

D. Defendants' Applications And The Order Granting Leave

Following the decision in Van Buren, a poll of the Court of Appeals Judges was conducted to determine whether a special panel should be convened pursuant to MCR 7.215(I), now MCR 7.215(J). That poll resulted in the Court of Appeals declining to convene a special panel, and an order to this effect was entered February 8, 2002. Title Office, Inc v Van Buren Co Treasurer, 249 Mich App 801; 642 NW2d 705 (2002). (Appellant's Appendix, Docket Nos. 121077 and 121078 at p A28.) Thereafter, on February 28, 2002, Van Buren County Treasurer, Karen Makay, filed a timely Application for Leave to Appeal with this Honorable Court (Docket Nos. 121077, 121078). On March 15, 2002, the remaining Defendants filed a Delayed Application for Leave to Appeal (Docket Nos. 121177, 121178), along with a Brief in Support.

In an Order entered April 2, 2003, this Court granted both Applications and issued the following directive:

> On order of the Court, the applications for leave to appeal are considered, and they are GRANTED. The parties are directed to include among the issues to be briefed the meaning, at the time of enactment, of "transcript" in 1895 PA 161 as amended, MCL 48.101, and whether by use of "transcript of any paper or record on file" the Legislature originally intended the act to cover subsequently developed means of document reproduction.

(Appellant's Appendix, Docket Nos. 121077 and 121078 at pp A29-A30.)

By way of the same Order, this Court granted the Association's request to participate in this case as *amicus curiae*. The Association now offers the instant Brief in support of the position that the fee provisions of the FOIA, rather than MCL 48.101, govern the amount that can be charged for the public records at issue in this case.

III. ARGUMENT

A. Both The Circuit Court In The Case At Bar And The Court Of Appeals In Oakland Co Treasurer v Title Office, Inc, 245 Mich App 196; 627 NW2d 317 (2001) Correctly Ruled That Plaintiff's Requests For Electronic Copies Of Property Tax Records Are Governed By The Fee Provisions Of The FOIA And Not MCL 48.101.

1. Standard Of Review

This case involves a question of statutory construction. Such questions are subject to *de novo* review by this Court. Huggett v Dep't of Natural Resources, 464 Mich 711, 717; 629 NW2d 915 (2001).

2. The Current State Of The Law Under Oakland County

As discussed above, the Circuit Court granted Plaintiff's Motion for Summary Disposition on the grounds that Plaintiff had not requested a "transcript" under MCL 48.101. This ruling is consistent with the Court of Appeals decision in Oakland Co, supra, where the Court of Appeals explained:

> Plaintiff admits that M.C.L. § 48.101(2); MSA 5.711(2) does not specifically authorize the sale of public records. The subsections of M.C.L. § 48.101; MSA 5.711 require fees for the preparation of tax certificates, abstracts, or transcripts. Defendant did not ask for the records in any of these forms, but instead requested an electronic copy of property tax data. Plaintiff's contention that M.C.L. § 48.101(2); MSA 5.711(2) provides a specific fee for an electronic copy of the public records at issue is in error.
>
> This Court has considered electronic copies as writings for the purpose of being public records under the FOIA. *Farrell v. Detroit*, 209 Mich.App. 7, 11, 530 N.W.2d 105 (1995); MCL 15.232(e) and (h); MSA 4.1801(2)(e) and (h). Moreover, public bodies are required to disclose nonexempt information in its stored

> and recorded format. *Farrell, supra* at 15, 530 N.W.2d 105. Plaintiff "is required to provide the 'public record' [defendant] request[s], not just the information contained therein." *Id.* at 14, 530 N.W.2d 105. In this case, defendant did not request a certificate, transcript, abstract, or paper copy. Because delinquent tax records are stored electronically, defendant is entitled to an electronic copy of that information. *Id* at 18, 530 N.W.2d 105.

Oakland Co, 245 Mich App at 320-321 (emphasis added).

As recognized by the Court of Appeals in the case at bar, the panel's decision in Oakland Co constitutes the controlling statement of law on this issue, unless and until a contrary decision is reached by this Court. MCR 7.215(I)(1), now MCR 7.215(J)(1). In the present case, the Association submits that despite Defendants' protestations to the contrary, the decision in Oakland Co was the correct one, and should be left undisturbed by this Honorable Court.

3. The Court Of Appeals' Conclusion in Van Buren That Electronic Records Qualify As "Transcripts" Under MCL 48.101 That Are Exempt From FOIA's Fee Requirements Is Erroneous

As reflected in this Court's Order granting leave to appeal, this case presents a rather intriguing issue of statutory construction. In this connection, the Association submits that two important principles of statutory construction are applicable to this case.

First, the general rule in Michigan is that statutory exemptions such as the FOIA fee exemption at issue in this case must be carefully scrutinized and not extended beyond their plain meaning. Grand Rapids Motor Coach Co v Grandville-Wyoming Transit Co, 323 Mich 624, 634; 36 NW2d 299 (1949). Stated more directly, statutory exemptions are strictly construed and should be given a limited rather than an expansive construction. See, e.g., People v Jahner, 433 Mich 490, 500, n 3; 446 NW2d 151 (1989); People v Brooks, 184 Mich App 793, 797; 459

NW2d 313 (1990); Rzepka v Farm Estates, Inc, 83 Mich App 702, 706, 707; 269 NW2d 270 (1978).

Second, it is well-settled that a statute must be construed in light of the circumstances that existed at the time of its enactment. Davis v Beres, 384 Mich 650; 186 NW2d 567 (1971); Board of Co Road Commissioners of Wayne Co v Lingeman, 293 Mich 229; 291 NW 879 (1940). As this Court stated in Davis:

> In 1940 our Court adopted and applied this rule of statutory construction, the then adoptive parent being Ruling Case Law (25 RCL, p. 959, s 215):
>
> > 'There is always a tendency, it has been said, to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after one sees the result of experience. The true rule is that statutes are to be construed as they were intended to be understood when they were passed. Statutes are to be read in the light of attendant conditions and that state of the law existent at the time of their enactment. The words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted.' (quotation taken from Wayne County Commissioners v. Wayne County Clerk, 293 Mich. 229, 235, 236, 291 N.W. 879, 881).
>
> We applied it again in Husted v. Consumers Power Co. (1965), 376 Mich. 41, 54, 135 N.W.2d 370. The rule originated when Platt v. Union Pacific R. Co. (1878), 99 U.S. 48, 63, 64; 25 L.Ed. 424 was handed down. It appears textually now in 50 Am.Jur. Statutes, s 236, p. 224. The concluding sentence of section 236 reads:
>
> > 'Since, in determining the meaning of the terms of a statute, the aim is to discover the connotation which the legislature attached to the words, phrases, and clauses employed, the words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted, and the

> statute must be construed as it was intended to be understood when it was passed.'

Davis, supra, 384 Mich at 653 (emphasis added).

When these principles are applied to the present case, the Court of Appeals' rationale regarding why it would not have followed the decision in Oakland Co completely unravels. Instead of narrowly construing the exemption contained in MCL 15.234(4), the Court of Appeals adopted a broad definition of the word "transcript" appearing in MCL 48.101, and held that it was broad enough to cover computerized records of property tax data that are otherwise covered by the FOIA. Such an approach does violence not only to the common law rule that exemptions must be strictly construed, but to the very language of the FOIA exemption itself, which requires that the fee be "specifically provided" by another act or statute. MCL 15.234(4).

Unlike the court in Oakland Co, the Court of Appeals in the case at bar declined to attach any measure of significance to the fact that MCL 48.101 was passed by the legislature in 1895. For the reasons discussed in Davis, supra, this facet of the Court of Appeals' analysis is likewise erroneous. The Association deems it fair to say that the furthest thing from anyone's mind in 1895 was the availability of digital electronic means for making public records available to the general public on computer tape at minimal cost.[3] Rather, as the language of MCL 48.101 readily implies, the copying of a public record in 1895 actually required that a "transcript" be

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[3] Indeed, as the Defendants in Docket Nos. 121177 and 121178 readily concede, "the Legislature in 1895 could not have perceived the sweeping technological changes that would occur during the 20th Century." (See, Appellants' Brief, Docket Nos. 121177 and 121178 at p 22.)

made by hand of the actual paper document on file with the county.[4] To borrow from this Court's language in Davis, a transcript in 1895 simply was not, nor could it have been, "commonly spoken of and regarded" as including either photocopying or the magnetic reproduction of property tax data onto a computer tape. Davis, supra, 384 Mich at 653-654. Consequently, for this reason, the Court of Appeals' broad construction of MCL 48.101 is simply in error.

To summarize, when the statutes at issue are properly construed, the reasons given by the Court of Appeals regarding why it would not have followed its prior holding in Oakland Co are simply not persuasive. This Court's precedent is clear that in construing MCL 15.234(4), a court is required to give effect to each and every word in the statute. See, e.g, Omelenchuck v City of Warren, 466 Mich 524; 647 NW2d 493 (2002). In the present case, for reasons that will be more fully developed below, MCL 48.101 does not "specifically provide" the amount of the fee to be charged for copying property tax data onto a magnetic computer tape.[5] Rather, as the Circuit Court and the Court of Appeals in Oakland County correctly held, MCL 48.101 provides the fee for making a "transcript."

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[4] In this connection, it bears noting that a "transcript" has been recently defined as "a handwritten, printed or typed copy of testimony given orally." Black's Law Dictionary, (7th ed.) (1999) (emphasis added).

[5] For similar reasons, MCL 48.101 likewise does not "specifically authorize" the sale of the records at issue to the general public. It suffices to say that Defendants have offered no persuasive basis for challenging the Court of Appeals' conclusions in this regard. See, Van Buren, supra, 249 Mich App at 329-333.

4. There Is No Persuasive Basis For Concluding That The Legislature Intended In 1895 That What Is Now MCL 48.101 Would Cover the Computerized Reproduction Of Property Tax Records Onto A Computer Diskette

Once again, in its Order granting leave to appeal, this Court instructed the parties to address the following issue:

> "the meaning, at the time of enactment, of 'transcript' in 1895 PA 161 as amended, and whether by use of "transcript of any paper or record on file" the legislature originally intended the act to cover subsequently developed means of document reproduction."

With all due respect, the Association submits that trying to respond to this directive has given rise to various briefs and arguments that reflect nothing more than a tedious exercise in futility. For example, various parties and *amici* suggest that this Court should rely upon the definition of "transcript" appearing in dictionaries and court opinions that were published around the time that 1895 PA 161 was originally passed. (See, *Amicus* Brief filed by the Michigan Association of County Treasurers ("MACT's Brief") at pp 11-12; Appellants' Brief in Docket Nos. 121177 and 121178 at pp 18-19.) Because these sources describe or define a "transcript" in part as a "copy of any kind," these parties argue that the legislature must have intended to include copies of computer generated data within the realm of records covered by 1895 PA 161.[6]

The Association submits that relying on these older definitions is not helpful. Like the legislators themselves, the authors of these definitions simply could not have had in

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[6] Not surprisingly, these parties conveniently gloss over those portions of the definitions they rely upon that describe a transcript as a "writing" or a "written copy". See, MACT's Brief at 11; see also, Appellants' Brief in Docket Nos. 121177 and 121178 at p 18.

mind the existence of computerized records at the time the definitions themselves were composed. It therefore adds nothing to the analysis to extrapolate from arguably contemporaneous dictionary definitions of the word "transcript" the notion that the legislature must have intended to include computerized records when it originally enacted 1895 PA 161. Not only is such an argument "bootstrapping," but it is "bootstrapping" that relies on an impossible underlying premise.

By the same token, it adds nothing to the analysis to rely on how courts have interpreted the term "transcript" as it appears in other contexts and in other, more modern, statutes. One simply cannot conclude, based on how courts have interpreted the word "transcript" as it appears in 5 USC § 7701, that the same result would follow concerning whether computer records constitute "transcripts" under a statute passed in 1895. (See, Brief of Defendants in Docket Nos. 121177 and 12478 at pp 20-21.) These cases simply have no bearing whatsoever on the issue presented by this case, which involves whether MCL 48.101 "specifically" sets forth the fee for reproducing computerized public records onto a computer diskette.

In short, this case involves a temporal element that spans a gap of more than 100 years, a gap that is simply impossible to bridge. Absent some reliable contemporaneous legislative history (which the Association has not been able to locate), there is simply no way of reliably determining whether in 1895 the Michigan legislature intended that the phrase "transcript of any paper or record on file" include the then science fiction-like notion of instantaneously

copying computerized data onto a portable diskette.[7] With that in mind, the Association will direct its efforts elsewhere.

5. The Express Language Of MCL 15.234(4) Dictates That The Fee For Obtaining Computerized Property Tax Data Is Governed By FOIA And Not MCL 48.101

The Association submits that proper resolution of this case can be achieved by focusing on the express language of MCL 15.234(4):

> This section does not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public, or if the amount of the fee for providing a copy of the public record **is otherwise specifically provided** by an act or statute.

[Emphasis added.]

Just recently, in People v Katt, __ Mich __; __ NW2d __; 2003 WL 21242909 (2003), this Court had the opportunity to interpret the word "specifically" in the context of the Michigan Rules of Evidence. At issue in Katt was how to interpret what is commonly referred to as the "catch-all" exception to the hearsay rule. In relevant part, MRE 803(24) states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> * * * * *

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[7] In its Brief, MACT argues that the legislative history underlying FOIA supports the conclusion that MCL 48.101 specifically governs the fee at issue in this case. (See, MACT's Brief at pp 14-15 and MACT's Exhibits 76A-82A.) Contrary to MACT's assertions, a careful review of this purported "history" discloses that it does not support, let alone "strongly indicate," that MCL 15.234(4) was intended to exempt the fees set forth in MCL 48.101.

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness. . .

[Emphasis added.]

Rejecting the argument that MRE 803(24) would not apply where the proposed evidence was a "near miss" under one of the specifically delineated hearsay exceptions, this Court reasoned:

> In our view, the arguments in favor of the near-miss theory are unpersuasive and do not conform to the language of the rule. *Random House Webster's College Dictionary* (1995) defines "cover" as "8. to deal with or provide for; address: The rules cover working conditions." Therefore, a rule concerning the same subject matter as a piece of evidence, or from a similar source, arguably could be said to "cover" that evidence.
>
> If the rule applied to all evidence not "covered" by other exceptions, the near-miss theory would be more persuasive. However, the rule modifies the term "covered" with the adjective "specifically." Hence, more than simple "coverage" is required. Black's Law Dictionary (7th ed) defines "specific" as "1. Of, relating to, or designating a particular or defined thing; explicit. . . 2. Of or relating to a particular named thing. . . 3. Conformable to specific requirements. . ."
>
> Reading the words "specifically covered" together and giving each its normally understood meaning, we conclude that to be "specifically covered" requires more than to be "covered." Since "specific" can mean "conformable to specific requirements" and "cover" can mean "addressing" or "dealing with," we understand that a statement is only "specifically covered" by a categorical exception when it is conformable to all the requirements of that categorical exception. To hold otherwise would read "specifically" out of the rule.

[Emphasis added, footnotes omitted.]

The Association believes that this analysis provides considerable guidance relative to how this Court should interpret the language of MCL 15.234(4). As in Katt, the arguments of the various county treasurers might be more persuasive if MCL 15.234(4) merely excepted fees that were "otherwise provided" by another act or statute. However, as this Court recognized in Katt, by using the word "specifically" in MCL 15.234(4), the legislature plainly intended to require something more than just arguable coverage under another statute for the exemption to apply. To hold that MCL 48.101 "specifically" provides the fee for computerized data would require that the word "specifically" be read out of MCL 15.234(4).

In another case released just after the decision in Katt, this Court utilized the sixth edition of Black's Law Dictionary to ascertain the meaning of a statutory term. GC Timmis & Co v Guardian Alarm Co, __ Mich __; __ NW2d __; 2003 WL 21399027 (2003). In their entirety, Black's Law Dictionary (6th ed) contains the following definitions of "specific" and "specifically":

> **Specific.** Precisely formulated or restricted; definite; explicit; of an exact or particular nature. . . . Having a certain form or designation; observing a certain form; particular; precise; tending to specify, or to make particular, definite, limited or precise.
>
> **Specifically.** In a specific manner; explicitly, particularly, definitely.

[See, Addendum, Black's Law Dictionary (6th ed) at p 1398 (emphasis added).]

These definitions compel the conclusion that the fee provisions of FOIA rather than MCL 48.101 apply to the computerized records at issue in this case. On its face, MCL 48.101 certainly does not explicitly reference computerized records, and nothing the county treasurers have offered to this Court, either by way of dictionary definitions or purportedly

analogous precedent, establishes that the Michigan legislature, in 1895, so much as envisioned let alone intended that 1895 PA 161 encompass the computerized reproduction of property tax data.

As this Court has recognized time and again, courts are simply not at liberty to ignore the legislature's use of the word "specifically" in MCL 15.234(4). It would only be through rewriting the language of MCL 15.234(4) that the result advocated by the counties could be achieved. Of course, this is simply not the role of the judiciary.

> It is not the role of the judiciary to second-guess the wisdom of a legislative policy choice; our constitutional obligation is to interpret – not to rewrite – the law.

[State Farm Fire and Casualty Co v Old Republic Ins Co, 466 Mich 142, 149; 644 NW2d 715 (2002).]

Based on the foregoing, this Court should hold that the fee for the computerized property tax data at issue in this case is governed by the fee provisions of the FOIA as opposed to MCL 48.101. This is the only result consistent with the legislature's intent as clearly expressed in MCL 15.234(4).

B. Defendants' Policy-Related Arguments Do Not Compel A Different Result

On various occasions, Defendants have accused Plaintiff, as well as the panel in the Oakland Co case, of exalting "form over substance." (See, e.g., Appellants' Brief in Docket Nos. 121177 and 121178 at pp 3-4; Appellant's Brief in Docket Nos. 121077 and 121078 at p 23.) What Defendants fail to realize, however, is that it is the statutes themselves which dictate the fee to be charged based upon the form and availability of the record requested.

There is no dispute in this case that the property tax data maintained by the various counties in their computer files constitutes a "public record" under FOIA. See, Farrell v City of Detroit, 209 Mich App 7, 14-15; 530 NW2d 105 (1995). As a result, counties are expressly limited by the FOIA to charging the actual incremental cost of reproducing these records and, in so doing, counties are required to utilize "the most economical means available." MCL 15.234(1) & (3). In short, FOIA dictates that if counties maintain their property tax data on computer and can copy it upon request in computerized form, then counties must do so, and they must limit their fees to the actual cost of reproduction.

In direct contradiction to this stated legislative policy, Defendants urge this Court to rule that a 100-year old statute setting a fee for "making transcripts" somehow specifically provides the fee for providing this readily available computerized data at a cost that greatly exceeds a county's actual costs. The Association submits that the fallacy behind allowing such a result was aptly summarized by the Court of Appeals in Oakland Co, supra, where the Court of Appeals explained:

> The Legislature enacted M.C.L. § 48.101; MSA 5.711 in 1895. 1895 PA 161. The last pertinent amendment took place in 1974, 1974 PA 141, when the Legislature raised the cost the counties could charge for copies. Clearly, the 1895 Legislature did not contemplate a charge for electronic copies when it enacted M.C.L. § 48.101; MSA 5.711. Moreover, when the Legislature amended the statute, over twenty-seven years ago, there still was no indication that it applied to electronic copies. This statute was clearly designed to compensate the county for its cost of manipulating data into certified transcripts or abstracts. Plaintiff, in this case, would not incur the costs of certifying or making transcript, and, therefore, the purpose of charging the statutory fees is absent.

Oakland Co, supra, 245 Mich App at 203 (emphasis added).[8]

Contrary to Defendant Makay's assertions, it is the Defendants, not Plaintiff, who are engaging in a "strained reading and distortion" of the relevant statutes. (Appellant's Brief in Docket Nos. 121077 and 121078 at p 20.) Contrary to Defendants' position, it is only through the most tortured construction of MCL 15.234(4) – a construction similar to that advanced by the Court of Appeals below – that one can derive the conclusion that MCL 48.101 "specifically" provides the fee for providing computerized property tax data.

Defendants attach great significance to the fact that Plaintiff is a business that allegedly intends to utilize the data for commercial purposes.[9] Evidently, Defendants believe that this circumstance somehow justifies charging Plaintiff tends of thousands of dollars over and above what is dictated by FOIA. The Association submits that the provisions of FOIA itself speak directly to this issue. It is undisputed that Plaintiff, a corporation, qualifies as a "person"

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[8] This analysis succinctly answers MACT's argument at page 14 of its Brief that periodic updates to MCL 48.101 over the years reflect a legislative intent to cover computerized reproductions of data. Simply stated, one can just as easily argue, given the fact that the fees set forth in MCL 48.101 have not been updated since the advent of the computer age, that the legislature has not considered the issue of whether MCL 48.101 should apply to electronic data.

[9] In this regard, the Association seriously questions whether Defendants would be advocating the same position if Plaintiff were simply a college student doing academic research, even though Defendants' argument would compel the same result. In any event, the Defendants assert that Plaintiff either intends to make or is already making the data in question available to the public via a website. The Defendants in Docket Nos. 121177 and 121178 claim that Plaintiff charges a fee for this service, but offer no citation to the record to support this claim. (Appellants' Brief, Docket Nos. 121177 and 121178 at pp 6, 34.) Furthermore, although Defendant Makay suggests that there are statements in the record to the effect that Plaintiff might someday charge a fee to access its website, there is evidently no record evidence that Plaintiff actually or presently intends to do so. (Appellant's Brief, Docket Nos. 121077 and 121078 at p 22.) Whatever the case, as the discussion below will indicate, this circumstance is simply irrelevant under FOIA.

within the meaning of FOIA. MCL 15.232(c). With regard to the fee that can be charged to any "person," MCL 15.234(3) expressly states:

> Fees shall be uniform and not dependent upon the identity of the requesting person.

The import of this unambiguous language is clear: businesses and individuals must be treated alike, and the alleged purpose for which the records are sought is of no consequence in computing the fee. Had the legislature intended to attach relevance to the purpose for which the records were sought (i.e., commercial versus personal), it could have easily altered the fee structure accordingly. However, the legislature chose not to do so, and instead simply chose to separate records into two categories: those that are exempt from disclosure and those that are not. See, MCL 15.232(e). It therefore follows that it is the Defendants, not Plaintiff, who stand to receive a "windfall" if MCL 48.101 is held to apply to the facts of this case.

In closing, the Association can think of no justifiable public policy that would support allowing Defendants, and possibly other Michigan counties, to generate many thousands of dollars in revenue by charging disproportionate fees for providing public records that can be reproduced electronically at literally a fraction of the cost. In any event, such policy decisions rest with the legislature, not the courts. State Farm Fire & Casualty, supra, 466 Mich at 149. As it now stands, FOIA dictates that the records in question be provided at the minimal charge set forth in MCL 15.234(1) and (3), not MCL 48.101.

IV. CONCLUSION AND RELIEF REQUESTED

For all the within stated reasons, the Association respectfully requests that this Honorable Court affirm the decision of the Court of Appeals.

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rather than upon the public generally. A private law. A law is "special" when it is different from others of the same general kind or designed for a particular purpose, or limited in range or confined to a prescribed field of action or operation. A "special law" relates to either particular persons, places, or things or to persons, places, or things which, though not particularized, are separated by any method of selection from the whole class to which the law might, but not such legislation, be applied. Utah Farm Bureau Ins. Co. v. Utah Ins. Guaranty Ass'n, Utah, 564 P.2d 751, 754. A special law applies only to an individual or a number of individuals out of a single class similarly situated and affected, or to a special locality. Board of County Com'rs of Lemhi County v. Swensen, Idaho, 80 Idaho 198, 327 P.2d 361, 362. *See also* Private bill; Private law. *Compare* General law; Public law.

Special lien. A special lien is in the nature of a particular lien, being a lien upon particular property. A lien which the holder can enforce only as security for the performance of a particular act or obligation and of obligations incidental thereto. *See also* Lien.

Special matter. In common law pleading, under a plea of the general issue, the defendant is allowed to give special matter in evidence, usually after notice to the plaintiff of the nature of such matter, thus sparing him the necessity of pleading it specially. 3 Bl.Comm. 306.

Special permit. *See* Special use permit.

Special registration. In election laws, registration for particular election only which does not entitle elector to vote at any succeeding election.

Special session. An extraordinary session. *See* Session.

Specialty. A contract under seal. Furst v. Brady, 375 Ill. 425, 31 N.E.2d 606, 609. A writing sealed and delivered, containing some agreement. A special contract. A writing sealed and delivered, which is given as a security for the payment of a debt, in which such debt is particularly specified. *See* Contract *(Special contract).*

For assessment purposes, a "specialty" is a building or buildings, constructed or peculiarly adapted to conduct of owner's business, which cannot be converted to general industrial use without the loss or expenditure of very substantial amounts of money. Great Atlantic & Pac. Tea Co., Inc. v. Kiernan, 49 A.D.2d 99, 371 N.Y.S.2d 173, 175.

Specialty debt. A debt due or acknowledged to be due by deed or instrument under seal. 2 Bl.Comm. 465.

Special use permit. Permitted exception to zoning ordinance; *e.g.* church, hospital, etc. A special use permit allows property owner to use his property in a way which the zoning regulations expressly permit under the conditions specified in the regulations themselves. Shell Oil Co. v. Zoning Bd. of Appeals of Town of Bloomfield, 156 Conn. 66, 238 A.2d 426, 428. "Special permit" and "special exception" have the same meaning and can be used interchangeably. Beckish v. Planning and Zoning Comm. of Town of Columbia, 162 Conn. 11, 291 A.2d 208, 210. *See also* Special exception; *Compare* Variance.

Special use valuation. An option which permits the executor of an estate to value, for death tax purposes, real estate used in a farming activity or in connection with a closely-held business at its current use value rather than at its most suitable or highest and best use value. Under this option, a farm would be valued at its value for farming purposes even though, for example, the property might have a higher value as a potential shopping center. In order for the executor of an estate to elect special use valuation, the conditions of I.R.C. § 2032A must be satisfied.

Special warranty. A covenant of "special warranty" is one the operation of which is limited to certain persons or claims. Central Life Assur. Soc. v. Impelmans, 13 Wash.2d 632, 126 P.2d 757, 763. A "covenant to warrant" in the habendum clause is not a general but at most a "special warranty". New Orleans & N. E. R. R. v. Morrison, 203 Miss. 791, 35 So.2d 68, 70. *See also* Warranty.

Special warranty deed. A deed in which the grantor only covenants to warrant and defend the title against claims and demands of the grantor and all persons claiming by, through and under him. In some jurisdictions, such deed is called a quitclaim deed (*q.v.*).

Specie /spíyshiy(iy)/. Coin of the precious metals, of a certain weight and fineness, and bearing the stamp of the government, denoting its value as currency. Metallic money; *e.g.* gold or silver coins.

When spoken of a contract, the expression "performance *in specie*" means strictly, or according to the exact terms. As applied to things, it signifies individuality or identity. Thus, on a bequest of a specific picture, the legatee would be said to be entitled to the delivery of the picture *in specie; i.e.,* of the very thing. Whether a thing is due *in genere* or *in specie* depends, in each case, on the will of the transacting parties.

Species /spíyshiy(iy)z/. Lat. In the civil law, form; figure; fashion or shape. A form or shape given to materials.

Specific. Precisely formulated or restricted; definite; explicit; of an exact or particular nature. People v. Thomas, 25 Cal.2d 880, 156 P.2d 7, 17. Having a certain form or designation; observing a certain form; particular; precise; tending to specify, or to make particular, definite, limited or precise.

As to *specific* Denial; Devise; Legacy, and Performance, see those titles.

Specifically. In a specific manner; explicitly, particularly, definitely.

Specificatio /spèsəfəkéysh(iy)ow/. Lat. In the civil law, literally, a making of form; a giving of form to materials. That mode of acquiring property through which a person, by transforming a thing belonging to another, especially by working up his materials into a new species, becomes proprietor of the same.